

**STATE BAR OF CALIFORNIA**  
**COMMISSION FOR THE REVISION OF THE RULES**  
**OF PROFESSIONAL CONDUCT**

*MEETING SUMMARY - OPEN SESSION*

**Friday, February 20, 2009**  
(9:15 am - 5:00 pm)

**LA–State Bar Office**  
**1149 South Hill Street**  
**Los Angeles, CA 90015**

**MEMBERS PRESENT:** Harry Sondheim (Chair); Linda Foy; JoElla Julien; Robert Kehr; Stan Lamport; Raul Martinez; Kurt Melchior (by telephone); Ellen Peck; Hon. Ignazio Ruvo (by telephone); Jerry Sapiro (by telephone); Mark Tuft; Paul Vapnek.

**MEMBERS NOT PRESENT:** Dominique Snyder (leave of absence); and Tony Voogd.

**ALSO PRESENT:** Carole Buckner (COPRAC Liaison); George Cardona (U.S. Attorney, C.D. Cal.); Randall Difuntorum (State Bar Staff); Diane Karpman (Beverly Hills Bar Association Liaison); Mimi Lee (State Bar Staff); Howard Miller (Board Liaison); Kevin Mohr (Commission Consultant); Toby Rothschild (Access to Justice Commission Liaison); Russell Weiner (Office of the Chief Trial Counsel); and Mary Yen (Office of General Counsel) (by telephone).

**I. APPROVAL OF OPEN SESSION ACTION SUMMARY FROM THE DECEMBER 12, 2008 AND JANUARY 16, 2009 MEETINGS**

The draft open session action summaries were deemed approved.

**II. REMARKS OF CHAIR**

**A. Chair's Report**

The Chair announced that comprehensive assignment documents will be distributed at the end of the meeting.

**B. Staff's Report**

Staff reported on agenda items to be considered at the Board of Governors March meetings. Mr. Tuft and Mr. Vapnek agreed to be available to attend the Board's Regulation, Admissions, and Discipline Committee meeting to monitor the Board Committee's discussion of the Commission's charge and COPRAC's proposed formal opinion Interim No. 05-0001 (re modification of fee agreements). With regard to the Board Committee's consideration of the Commission's charge, the Chair indicated that he would be in contact with Board's liaisons to mention that recommendations that deviate from case law precedent and recommendations that deviate from statutes are inherently different policy considerations because the latter may be perceived as

placing the Judicial Branch in conflict with the Legislative Branch while the former only involves law that emanates from the Judicial Branch.

### **III. MATTERS FOR ACTION - CONSIDERATION OF PROPOSED RULES NOT YET CIRCULATED FOR PUBLIC COMMENT (BATCH 4 OR 5)**

#### **A. Consideration of Rule 1.8.6 [Rule 3-310(F)] Payments Not From Clients**

The Commission considered Draft 5.5 of proposed Rule 1.8.6 (presented in a MR comparison chart) that was distributed for a 10-day ballot that ended on February 17, 2009. The Chair led a discussion of open issues and the following drafting decisions were made:

(1) In paragraph (a)'s explanation, the substitution of "public agencies" for "legal services" in the 4<sup>th</sup> paragraph, third sentence was deemed approved.

(2) In paragraph (a), regarding the issue of retaining the phrase "enter into agreement for, charge or collect . . ." as language that might be construed to mandate the timing of the requirement to obtain client consent, the codrafters agreed to draft a comment to explain that a lawyer should obtain such consent as soon as reasonably practicable.

(3) In Cmt. [1], the third and fourth sentence, the codrafters agreed to add "in the same matter" after "payor" and agreed to adapt the phrase "including when the lawyer is representing the payor in another matter."

The codrafters were asked to implement the above changes in a revised draft for submission to staff to conduct a 10-day ballot. There was no objection to the Chair deeming the proposed rule approved subject to the outstanding drafting that will be implemented in the 10-day ballot version of the rule.

(Intended Hard Page Break)

**B. Consideration of Rule 1.8.7 [3-310(D)] [ABA MR 1.8(g)] Avoiding the Representation of Adverse Interest (aggregate settlements)**

The Commission considered Draft 5 of proposed Rule 1.8.7 (in part, presented in a MR comparison chart) dated January 19, 2009. Mr. Kehr led a discussion of open issues and the following drafting decisions were made:

(1) In paragraph (a), regarding the issue of retaining the phrase “in a writing signed by the client,” the Commission considered voting on the following options: (i) revise the draft to use the phrase “informed written consent” = 8 yes, 2 no, 1 abstain; (ii) add the concept of an exception for exigent circumstances that would impose an obligation to have a writing as soon as reasonably practicable = 5 yes, 6 no, 1 abstain; and (iii) a third vote on whether to place the exigent circumstances exception in the rule or comments was not needed as that concept was not approved.

(2) In paragraph (a) the last sentence (“The lawyer’s disclosure shall include. . .”) was restored to track the MR language (2 yes, 2 no, 1 abstain). It was understood the codrafters would consider modifying this language to add the clarifying phrase “among other things.”

(3) Paragraph (b) was deleted (7 yes, 4 no, 1 abstain) as being inconsistent with a lawyer’s duty of undivided loyalty to each jointly represented client. It was noted that there are a variety of permissible current practices (such as a litigation trust) that can be used to effectively achieve the accommodation that paragraph (b) sought to address in a very prescriptive manner.

The codrafters were asked to implement the above changes in a revised draft, in particular conforming changes to the comments to track the Commission’s deletion of paragraph (b), for submission to staff to conduct a 10-day ballot. There was no objection to the Chair deeming the proposed rule approved subject to the outstanding drafting that will be implemented in the 10-day ballot version of the rule.

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### **C. Consideration of Rule 3.3 [Rule 5-200] Trial Conduct**

The Commission considered a first draft MR comparison chart for the Commission's proposed Rule 3.3. Mr. Tuft led a discussion of open issues and the following drafting decisions were made:

(1) Reversing the order of paragraphs (a)(3) and (a)(4) was deemed approved. It was understood that this permits the structure of the proposed rule to track the structure of MR 3.3.

(2) In paragraph (a)(4), the language was revised to use the phrase: ". . . the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal unless disclosure is prohibited by Bus. & Prof. Code §6069(e)" (10 yes, 0 no, 1 abstain). In addition, the codrafters agreed to add a comma after the word "tribunal."

(3) In paragraph (c), the language was modified to track the MR (5 yes, 4 no, 3 abstain) but the deleted codrafters' language (re ending the duty at termination) would be mentioned in the explanation as a minority position.

(4) In paragraph (a)(4) (that will be renumbered as (a)(3) to track the MR), the stricken language regarding Sixth Amendment rights was restored (7 yes, 4 no, 0 abstain) and it was understood that the codrafters would change the word "offer," in Cmt. [7], to "permit" or make some other similar conforming revision.

(5) For the explanation of paragraph (d), the codrafters agreed to provide a broader explanation.

(6) In Cmt. [1], the language regarding ancillary proceedings was restored (8 yes, 1 no, 3 abstain) and with this change the codrafters would reverse the majority and minority explanations.

(7) In Cmt. [3], first paragraph, third line, changing "the" to "a" before "defined" was deemed approved. Also in Cmt. [3], in the second paragraph, after "changes," the comma was deleted and the word "and" was inserted.

(8) In the heading for Cmt. [5], deleting the word "false" was deemed approved. Also in Cmt. [5], the language shown as stricken in the middle sentence was deemed deleted.

(9) In Cmt. [6], the underlined phrase starting with "other than. . ." was deemed deleted but the cross reference to Cmt. [7] was retained.

(10) In the explanation of Cmt. [6], the codrafters agreed to expand the discussion of the minority position along the lines of Mr. Sapiro's suggestion.

(11) In Cmt. [7], the last sentence was deemed revised to state that: "The obligations under these Rules and the State Bar Act are subordinate to applicable Constitutional provisions."

(12) For the explanation of Cmt.[14], the fourth paragraph, the following minor revisions were deemed approved: deleting the word "not;" changing "lawyer's obligations" to "duty of confidentiality;" and adding "Rules of Professional Conduct," before "State Bar Act."

The codrafters were asked to implement the above changes in a revised draft for submission to staff to conduct a 10-day ballot. There was no objection to the Chair deeming the proposed rule

approved subject to the outstanding drafting that will be implemented in the 10-day ballot version of the rule.

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#### **D. Consideration of Rule 3.6 [Rule 5-120] Trial Publicity**

The Commission considered a first draft MR comparison chart for the Commission's proposed Rule 3.6. Mr. Lamport led a discussion of open issues and the following drafting decisions were made:

(1) In the last line of the Introduction, the word "the" was deemed deleted.

(2) The codrafters agreed to implement all of Mr. Kehr's recommended revisions in his February 16, 2009 email message, namely: (i) in the Paragraph (a) explanation, the second sentence, the word "a" was replaced with "as;" (ii) in the Cmt. [1] explanation, the order of the two paragraphs was reversed; (iii) in the Cmt. [4] explanation, the second sentence was revised to read: "It is proposed in place of Comment [5] to the Model Rule."; and (iv) in the Cmt. [7] explanation, the phrase "as currently drafted" was deleted.

(3) The codrafters agreed to implement Mr. Sapiro's recommended revisions to the explanations of Cmt. [4] and [5], namely: (i) in the Cmt. [4] explanation, second sentence, replacing "was" with "is" and in the last sentence replacing "since" with "because that;" and (ii) in the Cmt. [5] explanation, the last sentence, deleting the word "a" before "criteria."

The codrafters were asked to implement the above changes in a revised draft. There was no objection to the Chair deeming the comparison chart approved.

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#### **E. Consideration of Rule 5-210 [ABA MR 3.7] Member as Witness**

The Commission considered a first draft MR comparison chart for the Commission's proposed Rule 3.3 (presenting Draft 4.2, the 10-day ballot version dated May 7, 2008). Ms. Peck led a discussion of open issues and the following drafting decisions were made:

(1) Regarding the issue of whether the rule should be limited to jury trials, the Model Rule approach was reinstated so that the rule would cover both jury and bench trials (7 yes, 4 no, 0 abstain). It was understood that the codrafters would revise the explanation to include the minority viewpoint favoring the more limited standard of the current RPC.

(2) Regarding the issue of whether to include a paragraph like the MR 3.7(b), the Model Rule approach was restored (5 yes, 4 no, 0 abstain) with MR 3.7(b) added back into the rule and the codrafters' Cmt. [4] deleted. Mr. Sapiro asked that the record show that he voted against this action due to the negative impact on solo practitioners that would not similarly burden lawyers in law firms.

The codrafters were asked to implement the above changes in a revised draft for submission to staff to conduct a 10-day ballot. There was no objection to the Chair deeming the proposed rule approved subject to the outstanding drafting that will be implemented in the 10-day ballot version of the rule.

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**F. Consideration of Rule 3.8 Performing the Duty of Member in Government Service [Rule 5-110]**

Matter carried over.

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**G. Consideration of Rule 1.15 [Rule 4-100] Safekeeping Property**

This rule was distributed for a 10-day ballot that ended on February 17, 2009. There was no objection to the Chair deeming the rule approved subject to the lead drafter implementing some minor, non-substantive revisions recommended by Mr. Kehr and Mr. Sapiro.

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**H. Consideration of ABA Model Rules 6.3 (Membership in Legal Services Organization), 6.4 (Law Reform Activities Affecting Client Interests) and 6.5 Nonprofit and Court-Annexed Limited Legal Services Programs)**

***Consideration of Rule 6.5***

The Chair welcomed Governor Howard Miller who discussed the Board's consideration of MR 6.5 at its January 10, 2009 planning meeting. The Commission was informed that the Board was interested in considering an amendment to the RPCs that adopts the policy of MR 6.5. In addition, the Commission was informed that there was an interest in facilitating promulgation of such an amendment on an expedited basis; however, promulgation of an expedited rule would not preclude the Commission's continued efforts to develop a separate proposal on ABA Model Rule 6.5 that comports with the Commission's overall effort to recommend comprehensive rule amendments. Mr. Rothschild commented that legal service programs are seeing a large unmet need for volunteer attorneys to provide assistance to clients on mortgage loan modification and foreclosure issues. Governor Miller indicated that the purpose and function of MR 6.5 would remove some of the conflicts of interest obstacles that are preventing some lawyers (i.e., lawyers whose law firm's clients include: banks; other lending institutions; or loan servicers) from volunteering.

In response to the foregoing, the following action was taken.

(1) The concept of MR 6.5 and comments, subject to a revision of the cross-reference language (that cites to Model Rules that do not have a counterpart in the RPCs) was adopted (10 yes, 2 no, 0 abstain).

(2) The codrafters were asked to revise the language of paragraph (a), that describes legal service programs, to include language along the lines of the following: "court, government agency, bar association, law school, or nonprofit organization or a legal services organization provided for in Business & Professions Code § 6210 et seq" (11 yes, 0 no, 1 abstain).

(3) Upon further consideration of the appropriate scope of an expedited rule, the Commission asked the codrafters to prepare a rule without any comments (out of concern that the consideration of comment language would delay the approval of an expedited rule) (6 yes, 5 no, 1 abstain).

(4) To process the expedited rule, Commission approval of a final draft would be sought through a special 5-day ballot procedure (9 yes, 2 no, 0 abstain). The codrafters were asked to submit a draft to staff on February 24, 2009 to start the ballot.

***Consideration of Rule 6.3***

The Commission considered a first draft MR comparison chart for the Commission's proposed Rule 6.3. Mr. Vapnek led a discussion of open issues and the following drafting decisions were made:

(1) In the paragraph (a) explanation, replacing the citation to "§6068(e)(i)" with "§6068(e)(1)" was deemed approved.

(2) The extraneous text in the paragraph (b) explanation was deemed deleted.

(3) In Cmt. [2], revising the end to state: “. . . confidential client information will be protected” was deemed approved.

(4) In the Introduction, the codrafters agreed to implement Mr. Kehr’s revision that retains the first sentence but then inserts “However. . . to protect client confidential information.” (See Mr. Kehr’s February 15, 2009 email message at page 1 of the email compilation.)

(5) A recommendation to add a reference to a “§1090 duty to recuse” was considered but rejected (1 yes, 6 no, 1 abstain).

The codrafters were asked to implement the above changes in a revised draft. There was no objection to the Chair deeming the comparison chart approved.

#### ***Consideration of Rule 6.4***

The Commission considered a first draft MR comparison chart for the Commission’s proposed Rule 6.4. Mr. Vapnek indicated only one open issue: consideration of Mr. Sapiro’s revision to the comment. The fifth sentence of the comment was revised to read: “In determining the nature and scope of participation in such activities, a lawyer must comply with the lawyer’s obligations to clients under other rules, particularly Rule 1.6” (7 yes, 1 no, 1 abstain). With this change, there was no objection to the Chair deeming the comparison chart approved.